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***1333** WITNESS PREPARATION FROM THE CRIMINAL DEFENSE PERSPECTIVE

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I. Introduction

This article explores basic approaches to witness preparation for the defense of criminal cases. It does not delve into the areas of communication experts, professional videotaping, shadow juries, and other approaches that are far beyond the reach of most trial lawyers. We will deal with techniques that are available to all. In the end, we will see that a more appropriate title might be "Lawyer Preparation from the Criminal Defense Perspective."

There is a very basic human principle that governs witness preparation: Most witnesses will revert to form under the pressure of the courtroom. Unfortunately, many lawyers, in their zeal to control that which takes place during the trial process, believe they can control witnesses. This is a recipe for disaster.

The courtroom is a very tense theater for the uninitiated. Though we may feel comfortable in it, our clients and witnesses do not. When a witness steps into the witness box, he or she may feel pressures that are totally invisible to us. The result of this stress is that many witnesses will not be the person you expected to show up and testify. He or she may be closer to the person you first met. This is not the witness's blunder; it is the lawyer's. The phenomenon and its remedies are not well-recognized or taught in law ***1334** schools. In fact, law schools probably help create the false impression that it is acceptable (within ethical bounds) to try to shape, mold, and change a witness's testimony. The prevailing wisdom is the more the lawyer practices with the witness, the better the witness will perform at trial. But it is closer to the truth to say that the more the lawyer practices with the witness, the more the lawyer buys into the myth that the witness will prevail at trial. So the lawyer lets down his guard.

Some witness preparation is essential; a little more will probably help. But it becomes a game of diminishing returns for the witness and a trap for the naive lawyer. The seasoned trial lawyer, on the other hand, listens closely to the potential witness's story, told the way the witness is comfortable telling it, and then tries as best he or she can to shape, mold, and change his or her questioning to meet the witness's story.

II. A Word About Ethics

Some lawyers feel that it is an acceptable practice in interviewing a client or a witness to avoid the truth of the story. [FN1] It is not! Lawyers who do this are perpetrating their own type of fraud on the courts. Find out what the truth is and deal with it in a professional manner. Over the course of a legal career, nothing good can come of trying to manipulate the system at such a base level. Whatever you do, do not take that approach-it is unethical. [FN2]

III. Preparing Yourself to Prepare a Witness

There are two parts to getting prepared to prepare witnesses to testify. First, know the law of the case, meaning the elements of the state's case and any defensive issues you may want to raise. This necessarily means that you have read the case law related to the charge your client is facing. It is simply shocking how often a lawyer will find an otherwise overlooked pearl hidden in case law. Legal preparation may be tedious, but it is relatively easy.

Second, know the facts of the case. Because factual preparation is not the strong point of our legal education system, we will spend a paragraph or two on that topic. There are four basic steps to adequate factual preparation. First, go to the scene. Second, go to the scene with the witness. Third, read any prior testimony-both this witness's and that of others. Finally, go to the ***1335** courtroom where the trial will take place, preferably when something is going on. Point out who the various players are and where people sit. These are the four basic steps toward your factual preparation.

Take this common example to illustrate the importance of the first three steps. Assume it is the pretrial hearing for a DWI case,and you have not been to the scene. The officer is on the stand, and you begin to question him. To the observer, everything seems quite normal. But to you, the lawyer, you know you are at the mercy of the officer. You have no idea if the testimony about the dynamics of the stop are correct. You are unable to ask follow-up questions because you have no independent factual basis on which to challenge the answers. Though this is not a witness that a criminal defense lawyer would normally prepare to testify, this example is illustrative of exactly the problem we have when we do prepare a witness without first preparing ourselves.

Visiting the scene is so critical to our preparation because we process information we gain visually different from information we gain through reading or hearing. Information we gain visually is a vast and complex factual

reservoir that we can draw on, almost without limit, to test the memory of a witness. And the fresher the visit, the better the memory. Information we gain through reading or hearing, on the other hand, is a flat, two-dimensional, constricting model at best. And if our facts come from something that the witness himself has written, we are truly at that witness's mercy. If you have been to the scene, when the witness makes a mistake in testimony, you are ready.

All of these principles are at play in witness preparation. Lawyers should not be at the mercy of their witness, or any other witness. Going to the scene, viewing the evidence, and other nonintellectual exercises are essential to gaining necessary leverage to prepare yourself and your witness. It is axiomatic that you want to catch your witness's mistakes before the other lawyer does.

It helps to explain to your witness why the two of you are visiting the scene. Talk to the witness about the strength of a new visit versus reliance solely on old memories. The witness needs to have assurance from you that going to the scene is going to make him or her a better witness. He or she should be told that it will make the courtroom a more level playing field when it comes to cross-examination by the other lawyer.

IV. Witness Instructions

The idea of giving a witness a set of written instructions is good, simply because it may calm the witness down. It may also make the bond between you and the witness stronger. The following list is suggested if you think giving the witness something in writing is in order:
***1336** 1. Tell the truth.
2. Don't hurry, take your time.
3. Listen to each question asked.
4. Answer that question. You do not need to explain or elaborate.
5. If you are not sure of the answer to a question, say so.
6. If you do not know the answer to a question, you can say that too.
7. Do not exaggerate.
8. Do not be afraid to admit a damaging fact. Do not be evasive just because you do not like the answer.
9. Be polite.
10. Keep your eyes up. Look at the person who is asking the question.

No witness can follow all of these instructions all of the time. Additionally, do not be surprised if the witness is unable to follow the directions once he is on the stand. Remember, you are the professional in the courtroom, not the witness. If there are problems with the testimony, it is your problem to address, not the witness's.

V. A Simple Formula for You

Do not view testimony as necessarily linear. Although good storytelling should flow chronologically because this is how the jury can best follow it, you can tweak this format. It is better to view a direct examination, especially if you are putting your client on the stand, as circular. Try beginning and ending with the same question. For instance, in the case of a defendant charged with killing his wife, the first and last question might be, "Did you kill your wife?" That means you have asked the question and gotten the negative answer twice. If you are clever, you can also ask the question a third time during the development of the chronology. Tell the witness you are going to begin and end with the same question. Repetition of essential facts builds memory of those facts for the jury.

A. First Things First

It is critically important that you train yourself to start your direct examination with a witness where you told him you would start. Staying with the example of a defendant charged with murdering his wife, here is how to cause a

witness to self-destruct.

You have rehearsed direct and cross-examination and told your client that the first thing you will ask him is "Did you kill your wife?" Both of you understand this, and it has its intended calming effect. The dramatic and tension filled moment comes, and the first question out of your mouth is "Tell us your name." You sense absolutely nothing is wrong. At the same moment your client senses betrayal. A change of plans has taken place about which ***1337** he is clueless. What is going on? The insecurity begins. Always start where you agree you are going to start. The first question should not be ad lib; do not wing it. It should be planned and executed for a number of reasons, but the main one is witness control.

B. Teaching the Witness Your Style of Questioning-Expanding and Contracting Time in the Courtroom

One of the basics of telling your story through direct examination is the art of expanding and contracting time in the courtroom. We all know that real time is not a good vehicle for telling an interesting story in the courtroom. It is not even an interesting form for telling a story to a three-year-old. But, making that which took place in ten seconds in real time last for ten minutes in the courtroom is a learned technique. It is how we paint word pictures for juries. First, you must learn it. Then, you must teach it to your witness.

If you want to contract time, ask the standard question, "Tell us what happened." With no markers or restraints in the question, most witnesses will go through the sequence of events rapidly, with little detail and, therefore, little interest to the listeners. If you really want to speed things up, add the word "briefly" or the phrase "very briefly" to the question.

When you need to spend some courtroom time on an event that may have happened quickly, you, the lawyer, need to interact with the witness to keep control of the chronology, and you must have the witness tell the story at your pace, not his. Of all the techniques of direct examination, this concept of slowing a witness down so that you can effectively use the witness to get the details of an event out, is the most critical. Thus, the first question is transformed. "Tell us the first thing that happened." Or, "When did you first see . . . ?" Or, "What was the very first thing that brought your attention to . . . ?" This modification of the old reliable direct examination question makes all the difference in the world as long as the witness is clued into the game being played.

It is important for you to explain that there will be times when you want the witness to slow down during his or her testimony. Additionally, it is important for you to explain to the witness how you will do it. Practice a series of questions with the witness that actually allows the witness to participate in a paced and detailed direct examination. For the lawyer, this technique of expanding time combines two devices of direct examination.

The first device is to begin by using a clue question that contains a limiting word like "first" or the phrase "very first." The second device is what some call "looping." Looping is the practice of borrowing something from the witness's answer and incorporating it into your next question. It might look something like this:
***1338** Q. When was the first time you saw Mr. Jones's car?
A. At the intersection of Fifth Avenue and Twelfth Street.
Q: When you saw his car at that intersection, where were you?
A. About a half block away, on the east side of Fifth Avenue.
Q. From a half block away, what was the first thing you saw the car do?

It is a type of direct examination that allows the lawyer to be a close participant with the witness, while still maintaining the purity of form of direct examination.

The skillful lawyer may be able to pull this type of examination off with even the unprepared witness. The clues to stopping the answer and allowing the lawyer to get back in with another short, limited, direct examination question are built into each question. They are strong clues, and they make common sense. Thus, even the

unprepared witness may well be able to follow the instructions that are built into the questions. But the skillful lawyer will always go through this type of questioning with each witness so that the lawyer can have some comfort level that the witness gets the program, and so the witness feels the same comfort level with the lawyer.

C. The Run-on Witness on Direct Examination

At this point, you have gone through the examination with the witness in your office and everything seems fine. You feel that he understands that at certain points of the testimony, you will slow things down by using a certain type of question with the word "first" in it. It is show time.

The witness implodes. Your question, "What was the very first thing that happened?" might as well have been "What happened, in one sentence?" The witness is off and running. Do not just sit there, do something! It is time to interrupt. "Mr. Smith, let's back up just a second." "Mr. Smith, we're getting a little ahead of ourselves."

There are three things to remember about interrupting your own witness in this situation. First, go directly to the witness, not to the judge. It is difficult to ask the judge for help in these situations without appearing whiney. Second, use the expansive pronouns "us" or "we", not exclusive ones like "I." By doing this, you include the jury and the witness in your instruction to slow down. Otherwise, it not only excludes the jury, but it also makes it more of a personal admonition to the witness from you. "Let's back up" is much softer and more appealing than "I want you to back up." Finally, practice a crash-and-burn scenario with your witness.

***1339** D. Keep It Simple Stupid

In the world of trial law, the maxim that "less is more" is almost always true. As you formulate your case, you should always be aware that you do not need to over-prove a point. In fact, there is great danger in doing so. If you have five witnesses to the same event, find out which witness is best. Use that witness and forget about the rest. There is a phenomenon at work in the minds of jurors that says, when you start putting on multiple witnesses to prove the same point, you must have some doubt about that point. In other words, you undermine the credibility of the very point you are trying to make by over- proving it. In their book Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials, Robert H. Klonoff and Paul C. Colby explain this theory in detail. [FN3] In sum, the "less is more" approach eliminates unnecessary witnesses and achieves the goal of keeping your presentation simple and memorable.

E. The Counterintuitive Approach

Sponsorship strategy has another side to it that must be remembered when preparing an individual witness. Jurors tend to discount anything you say that is positive about your case because you are the advocate for that side. (Of course, this applies to the other side too.) However, if you introduce a bad fact through a witness, the jurors may tend to believe that fact implicitly. After all, because you are your client's advocate, why would you introduce a bad fact if it was not absolutely true.

In application, it works like this. Standard trial wisdom says that if you are going to put a defendant with an admissible prior conviction on the stand, you should be the one to bring it out. "Take the wind out of the sails" of the prosecution. You should question this wisdom. If the prior is not strictly relevant to the charges at hand, let's say a prior theft conviction in a DWI trial, let the prosecution bring it in on cross-examination. This means you have to prepare your witness to handle the prosecution's question. Because it is a very stylized question, it can be simply answered "Yes" with the defendant's eyes up. The first time I followed this philosophy in court, I was terrified. It went against everything I had been taught. It worked like a charm. The jurors all stated that they thought the impeachment by the prosecutor on the prior was a "cheap shot."

***1340** F. Preparing the Witness for Cross-Examination

The best way to prepare for cross-examination is to practice cross- examination with your witness. It is best to call in another lawyer. Try to emulate the style of the prosecutor who will be trying the case if you know how that lawyer handles cross-examination. Have the practice lawyer try several types of cross.

Here, your job of witness preparation has two parts. The first part is to prepare the practice lawyer to cross your witness. The second part is to watch your witness carefully for signs of weakness such as arrogance, temper, or condescension. If you detect any of these deadly traits, do the routine again, and see if the witness can adapt to the critique. If the witness cannot adapt to cross-examination, it is time to see if there is a work-around to using this witness.

A great example of this type of preparation can be found in Lawrence Taylor's book, To Honor and Obey. [FN4] It is the fascinating story of Michael Dowd's defense of New York society matron Luann Fratt's murder trial for killing her husband. [FN5] Dowd's defense was the battered woman's defense. [FN6] The book contains a withering practice cross-examination of Ms. Fratt conducted by lawyer Billy Mogulescu's (now Judge William Mogulescu). [FN7] It is instructive to note that Mogulescu stayed in role the entire time of the practice cross, including his exit from Dowd's office. [FN8] If you read these pages, you will know exactly how mock cross-examination should be done. [FN9]

VI. Experts

Experts are a special case. If you have an expert who has testified many times, your visits and practice sessions with that expert witness are more to make sure he or she is on the same page with you, to give him or her an outline of the testimony you expect to elicit at trial, and to observe the expert so that you can adapt yourself to his or her style.

However, sometimes we use experts who are not "forensic" in background or training. The courtroom is foreign to them. They may have testified once or twice before, but it is not a comfortable place. These experts are usually academics. They can be great witnesses, but you have to work with them. Here, the preparation skill is to do more play-acting in asking ***1341** questions and monitoring answers. Your job is to make it nonacademic. It must be understandable, if not simple. In other words, you may need to "de-geek" the witness. No matter how much effort you put into this, some "techno-babble" will leak out at trial. Again, it is not the witness's fault. You must be vigilant to always respond to the jury's needs in these instances by asking for an explanation when a technical word or phrase is used. If you do not like the first answer, ask for more explanation. This is the most common communication problem with experts. It can be minimized by practice and then made to disappear by good follow-up questioning on your direct examination before the jury.

VII. Conclusion

In the real world, there are a few witnesses who can actually be coached through practice examinations to become, for a short period of time, someone they are not. However, to count on this happening, even a majority of the time, is a fatal mistake for any trial lawyer. Prepare for disaster. The better approach is for the lawyer to absolutely master the techniques of direct examination. Use clear, short direct examination questions without multiple parts to them. Watch the witness. Plant clue words like "first" when you want to slow the witness down and present more details to the jury. Use the essential technique of "looping" questions and answers to continue getting a detailed story or otherwise gain control of the witness who is not behaving as you expected. The bottom line is that while witness preparation is essential, there is no substitute for lawyer preparation and courtroom skills. No matter how well you have prepared the witness to testify, you must prepare for the alternative. When you have done that, you and the witness will be prepared for trial.

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[FN1]. See, e.g., Alan Dershowitz, Reasonable Doubts 166 (1996) ("[A] criminal trial is anything but a pure search for truth. When defense attorneys represent guilty clients-as most do, most of the time-their responsibility is to try, by all fair and ethical means, to prevent the truth about their client's guilt from emerging."); see also Charles Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3, 8 (1951) ("I don't see why we should not come out roundly and say that one of the functions of the lawyer is to lie for his client . . . .").

[FN2]. See Model Rules of Professional Conduct Rules 3.3, 3.4 (1995).

[FN3]. Robert H. Klonoff and Paul C. Colby, Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials (1990). For a shorter, adapted version of this book, see Paul L. Colby & Robert H. Klonoff, Sponsorship Strategy, Litig., Spring 1991, at 1.

[FN4]. Lawrence Taylor, To Honor and Obey (1992).

[FN5]. See id.

[FN6]. See id.

[FN7]. See id. at 151-62.

[FN8]. See id.

[FN9]. I also recommend this book to you for other reasons pertaining to witness preparation. It is full of transcript, both preparatory and trial. It is one of the better trial books on the market.

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